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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 UNITED STATES OF AMERICA,)	Case No. 08cr0212-JLS
)	
12 Plaintiff,)	MEMORANDUM OF POINTS AND
)	AUTHORITIES IN SUPPORT OF MOTION TO
13 v.)	SET VIDEOTAPED DEPOSITION OF
)	MATERIAL WITNESS AND REQUEST FOR
14 BENNY LOPEZ (1),)	STATEMENT OF REASONS IN SUPPORT OF
)	CUSTODY
15 JUAN JOSE AGUIRRE-CRUZ (2),)	
)	Hearing Date: June 5, 2008
16 Defendants.)	Time: 9:30 a.m.
)	Judge: Nita L. Stormes

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18 Material Witnesses VICTOR MANUEL AYON-LIZARRAGA, CARLOS JODIN VILLEGAS-
19 HERNANDEZ, and RAMON SILVA-REYES, (hereinafter, "Material Witnesses") by and through their
20 counsel, Tamara D. DeHaan, submit the following Memorandum of Points and Authorities in support of
21 their motion to set videotaped deposition.

22 **I.**

23 **INTRODUCTION**

24 On or about January 13, 2008, the Material Witnesses were detained by the United States Border
25 Patrol at San Diego County, California, in connection with the arrest of BENNY LOPEZ and JUAN
26 JOSE AGUIRRE-CRUZ, each a defendant in the above-entitled case. The defendants have been
27 charged with multiple counts of transporting undocumented aliens in violation of 8 U.S.C. § 1324, et
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1 seq., and the Material Witnesses, who were being transported in a vehicle driven by defendant BENNY
2 LOPEZ at the time of their arrest, are being detained as a material witness under 8 U.S.C. § 1227(d).

3 The Material Witnesses are unable to arrange for their release by bail. However, it is unnecessary
4 to keep the Material Witnesses in custody because their testimony can be preserved through the use of a
5 videotaped deposition.¹ The Material Witnesses therefore request a court order that their testimony be
6 preserved through the use of a videotaped deposition and, thereafter, that they be allowed to return to
7 their respective homes in Mexico.

8 9 II.

10 THE TESTIMONY OF THE MATERIAL WITNESSES CAN BE 11 SECURED BY VIDEOTAPED DEPOSITION, AND THERE IS 12 NO COMPELLING REASON TO KEEP THEM IN CUSTODY. 13

14 Title 18, section 3144 of the United States Code provides, “No material witness may be
15 detained...if the testimony of such witness can adequately be secured by deposition, and if further
16 detention is not necessary to prevent a failure of justice.”

17 Since depositions of material witnesses may be used at trial in criminal cases, it is only in
18 exceptional circumstances, i.e., where the interests of justice will be denied, that a videotaped deposition
19 is not appropriate. Torres-Ruiz v. United States, 120 F.3d 933 (9th Cir. 1997) [citing Aguilar-Ayala v.
20 Ruiz, 973 F. 2d 411, 413 (5th Cir. 1992)] see also, 8 U.S.C. § 1324(d), Federal Rules of Evidence 804,
21 and Federal Rules of Criminal Procedure, Rule 15. Defendants may be present at the videotaped
22 deposition and therefore have a full and fair opportunity to cross-examine the witness. Further, the
23 videotape provides sufficient indicia of reliability to afford the trier of fact a satisfactory basis for
24 evaluating the truth of a statement. Dutton v. Evans, 400 U.S. 74, 89 (1970).

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27 ¹ While a witness may be detained for a reasonable period of time, the court must vigilantly guard an undocumented alien’s
28 “overriding liberty interest” and schedule a videotaped deposition at the earliest possible time. Aguilar-Ayala v. Ruiz, 973 F.
2d 411, 419 (5th Cir. 1992).

1 The government or the defendant can effectuate the detention of a material witness upon a
 2 showing that (1) the material witness will, in all likelihood, be unavailable to testify for trial, and (2) that
 3 the use of deposition testimony will deny the defendant a fair trial because live testimony would
 4 somehow be significantly different. Aguilar-Ayala v. Ruiz, 973 F.2d at 413 (5th Cir. 1992); United
 5 States v. Humberto Rivera, 859 F.2d 1204, 1208 (4th Cir. 1988). In the instant matter, that burden
 6 would be difficult to sustain because the Material Witnesses have indicated they are willing to return for
 7 trial if the government makes arrangements for their legal re-entry into the country and provides travel
 8 expenses.² (DeHaan Declaration at paragraph 8).

9 The Material Witnesses should not be detained because their testimony can be adequately
 10 secured by deposition. This is a very routine alien smuggling case. Based on interviews with the
 11 Material Witnesses, and the report submitted by the arresting agency, the facts to which the Material
 12 Witnesses are competent to testify are straightforward. (DeHaan declaration at paragraph 7).

13 Moreover, neither the Material Witnesses nor their Counsel has been informed by either the
 14 government or defense attorneys of any reason why the witnesses' detention is necessary to prevent a
 15 failure of justice. (DeHaan Declaration at paragraph 8.) Quite to the contrary, the witnesses have already
 16 spent a considerable time in jail and it is very important that they be released as soon as possible so that
 17 they may be reunited with their families in Mexico. (DeHaan Declaration at paragraph 7).

18 For these reasons, the Material Witnesses request that the court order the taking of their
 19 videotaped depositions immediately, and that they thereafter be promptly returned to Mexico.

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23 ² The government would undoubtedly take reasonable steps in this case, as it has in other similar cases, to secure the
 24 witnesses' testimony at trial by personally subpoenaing the witnesses, providing travel costs, and arranging for legal re-entry
 25 of the aliens. (United States v. Eufracio-Torres, 890 F.2d 266, 2170 (10th Cir. 1989) Cert. Denied 494 U.S. 1008 (1990)
 26 [Government need not guarantee the witness will be available, only that they use good-faith efforts to secure their presence at
 27 trial]; see also, Ohio v. Roberts, 448 U.S. 56, 65 (1980) [So long as the government uses reasonable measures to secure a
 28 witness at trial, a deposition is admissible over a defendant's Confrontation Clause and hearsay objections].

1 **III.**

2 **IF THE COURT DENIES THE MATERIAL WITNESSES' REQUEST TO**
3 **TAKE THEIR VIDEOTAPED DEPOSITION, THEY REQUEST THAT THE**
4 **GOVERNMENT PROVIDE THEM WITH A STATEMENT OF REASONS**
5 **WHY THEY HAVE TO REMAIN IN CUSTODY.**

6 Where a witness has been held in custody for more than 10 days, the government has an
7 obligation to prepare a biweekly report stating the reasons why such witness should not be released
8 following completion of his videotaped deposition.

9 The Material Witnesses are not aware of any reason why they should remain in custody, but to
10 the extent the government knows of any such reason, they hereby request that the government provide
11 them with a copy of a biweekly written report indicating these reasons.

12 **IV.**

13 **CONCLUSION**

14 For the foregoing reasons, the Material Witnesses respectfully request that their motion for the
15 taking of videotaped depositions be granted. In the alternative, the Material Witnesses request that they
16 be immediately provided with a statement of reasons why it is necessary to continue to detain them in
17 custody.
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20 DATED: May 20, 2008

LAW OFFICES OF TAMARA D. DeHAAN

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